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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1093

UNITED STATES OF AMERICA, *Appellant*

v.

PHILLIPSBURG NATIONAL BANK AND TRUST COMPANY, SECOND NATIONAL BANK OF PHILLIPSBURG, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

On Appeal From the United States District Court for the District of New Jersey

JOINT MOTIONS TO STRIKE, AFFIRM AND ADVANCE

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STATEMENT

Procedural Background

Appellees the Comptroller of the Currency, the Phillipsburg National Bank and Trust Company (PNB) and the Second National Bank (SNB) by this joint brief move before the Court for (1) an Order directing that certain matters referred to in the Jurisdictional Statement submitted by the Justice Department be stricken and that certain non-evidentiary ma-

terials lodged with the Clerk of the Court be redelivered; (2) that this Court affirm the decision of Judge Shaw in the Court below and (3) that the Court Order that the matter be advanced on the calendar for early argument. The Court need not consider this final motion should it decide to affirm the Court below.

The merger agreement between the two defendant banks was entered into in April 1967, almost three years ago. Application to approve the merger pursuant to 12 U.S.C. 1828(c), the Bank Merger Act of 1966 (hereinafter B.M.A. '66) was made to the Comptroller on May 1, 1967. A hearing on the matter was had before the Comptroller on August 14, 1967. Approval followed in November 1967. On January 16, 1968 the United States filed suit in the District Court challenging the merger as contrary to Section 7 of the Clayton Act. (15 U.S.C. 18) An eleven day trial was had before the United States District Court for New Jersey, Judge Shaw sitting. On October 20, 1969 the decision of the District Court approving the merger was entered on the docket. Notice of Appeal was timely filed and the Justice Department has now filed its Jurisdictional Statement with the Court.

The District Court Opinion

In evaluating the competitive effect of the merger the District Court used a geographical market including portions of Warren and Hunterdon Counties in New Jersey and Northampton and Bucks County in Pennsylvania. (Jurisdictional Statement, App. A, 15a-16a)[1] Within this market PNB would be the seventh largest bank and SNB, the thirteenth. (24a) The resulting bank would have 6.76% of the total assets

[1] Hereinafter similar references are made solely to the "a" page.

of commercial banks in this market area and 7.07% of total deposits. (24a-25a) Evaluating the merger in terms of the usual antitrust analysis (ease of access, trend toward concentration, prior merger history) the court found "no presumptive inference of anticompetitive effect". (27a) It then characterized the "evidence from which anticompetitive effect could be inferred [as] meager and not persuasive". (27a) Concluding its analysis in this phase of the case the Court found "that plaintiff has failed to sustain its burden of proof to establish by a preponderance of the evidence that the merger would have any measurable anticompetitive effect". (28a)

Plaintiff as to this initial phase of the case now seeks to raise the question of whether general social and economic factors can be used to define a market. (Jurisdictional Statement, 3) This is the first question presented. As to this phase of the case, the Justice Department has not raised any other question. It has reserved only by footnote appended to its first question the right, if probable jurisdiction is noted, to question the court's determination of the relevant line of commerce.

While the Court did not have to consider the convenience and needs test, no anticompetitive effect having been found, it nevertheless proceeded to consider this issue. After a thorough examination of the advantages accruing to the community from the merger the Court concluded:

> ". . . there is a preponderance of evidence showing that any conceivable anticompetitive effect of the merger is clearly outweighed by the effect of the transaction in meeting the needs and convenience of the community to be served. (41a)

In its final Conclusion the Court went further and again performed the balancing test required under B.M.A. '66 this time assuming that Phillipsburg-Easton and environs, the area proposed by the Justice Department, was the relevant market:

> "... even if there were *de minimis* anticompetitive effect in the narrowly drawn market proposed by the government, such effect is clearly outweighed by the convenience and needs of the community to be served by the merged bank." (42a)

Thus, the balancing test was performed in the narrow market proposed by Justice.

Justice seeks to raise two questions directed to this second phase of the case, whether the court looked to the proper "community" area in evaluating convenience and needs and whether the court adequately considered means alternative to merger. (Jurisdictional Statement 3, 4) These two questions, like the first, will be shown to be insubstantial and not to merit review by this Court. Unlike the first question, however, these last two directed to convenience and needs are pendent and depend fully on this Court's finding that the first question is substantial and merits review. Questions of convenience and needs cannot be reached unless anti-competitive effect is first established.

Other relevant facts to the extent necessary are considered under the related argument headings.

I

MOTION TO STRIKE REFERENCES TO AGENCY REPORTS AND TO ORDER CLERK TO REDELIVER MATERIAL NOT IN EVIDENCE WHICH HAS BEEN LODGED WITH THE COURT

Defendant-Respondents the Phillipsburg National Bank (hereinafter PNB), Second National Bank (hereinafter SNB) and William B. Camp, Comptroller of the Currency move before the Court for an order striking from the Jurisdictional Statement and from all briefs filed all references to various reports made by the banking agencies with regard to the proposed merger[2] and directing the Clerk of the Court to redeliver all such materials previously lodged with the Court which have not been placed in evidence. (See Jurisdictional Statement, 5 n. 4) In Jurisdictional Statement filed with the Court, the Justice Department has relied heavily on quotations from the Application to Merge (Jurisdictional Statement, 5) and the reports of the Federal Reserve Board and Federal Deposit Insurance Corporation (*Id.*, 6). These have been used to support its position that the case presents substantial questions meriting review. These reports were submitted to the Comptroller pursuant to 12 U.S.C. §1828(c) 4 which provides:

> "In the interests of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency, unless it finds

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[2] More specifically defendants move that the following be stricken:

(a) The complete statement of "The Proceedings" on pages 5, 6 and 7 with the exception of the concluding paragraph.

(b) The reference on page 10 to the Application.

(c) All of footnote 12 on page 11, together with the sentence in main text relating to testimony at Comptroller's hearing.

(d) All reference to the action of the advisory banking agencies in footnote 13 on page 13.

> that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection."

However, when the District Court acts in the matter, the Bank Merger Act of 1966 of which the prior section is but a part clearly and unequivocally provides:

> "In any such action, the court shall review *de novo* the issues presented." (12 U.S.C. § 1828(c) (7) (A))

The court is clearly required to hold a trial *de novo;* statements made by the banking agencies, whether approving or disapproving the action, are patently irrelevant to the issues which Justice here seeks to present to the Court. Indeed, in a letter sent by Attorney General Katzenbach to Senator Patman as Chairman of the Banking and Currency Committee he stated that he wanted the district court proceedings to involve a "trial de novo of all issues in any such suit". *1966 U.S. Code Cong. & Admin. News,* 1868. There is no question here that the Court is not required to pay any deference to the agency findings and recommendations, that the substantial evidence test or any similar test is not to be applied. Justice Douglas in *United States* v. *First City National Bank of Houston,* 386 U.S. 361, clearly stated:

> "Indeed the 1966 Act provides that the Court in an antitrust action 'shall review de novo the issues presented.' 12 USC § 1828(c)(7)(A). It is argued that the use of the word 'review' rather than 'trial' indicates a more limited scope to judicial action. The words 'review' and 'trial' might conceivably be used interchangeably. The critical words seem to us to be 'de novo' and 'issues pre-

> sented.' They mean to us that *the court should make an independent determination of the issues.* Congressman Patman, the Chairman of the House Committee that drafted the Act, in speaking of this de novo review said that the court would '*completely and on its own make a determination* as to whether the challenged bank merger should be approved under the standard set forth in paragraph 5 (B) of the bill.' He added that the 'court is not to give any special weight to the determination of the bank supervisory agency on this issue.' " (386 U.S. at 368) (Emphasis added)

A similar statement was made by this Court in *United States* v. *Third National Bank in Nashville,* 390 U.S. 171 (1968):

> "The task of the district courts was to inquire de novo into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by 'the convenience and needs of the community to be served.' " (390 U.S. at 178)

Judge Shaw in rendering his opinion below did make an independent determination. He did not have before him the reports of the agencies or the Application to Merge because Justice never sought to introduce them and because all of the parties fully recognized that his review was de novo.[3] During his opening statement,

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[3] When an officer of Second National was examined by deposition as to the context of the Application To Merge, counsel for the banks objected specifically thereto and the Justice Department attorney stated in response that "this may well be something that we will want to take up at the time of the trial . . ." (Ex. D-60, p. 145). The statement of the attorney for Justice at trial that "this is a trial de novo" clearly shows that the Department conceded that these materials could not be introduced. (Tr. 11)

counsel for the Justice Department made reference to the actions of the other banking agencies, but the Court was quick to remind counsel that this was a trial *de novo:*

> "I doubt very much whether the Court should be concerned at all about any opinion of any agency with respect to this merger. The case must be decided upon the evidence produced here and not on the basis of opinions that are not in the nature of expert opinions normally admissible in evidence. I am not ruling on it now. I am just bringing that to your attention . . .
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> * * *
>
> . . . that the Court has the obligation to evaluate the facts independently of any prior opinions." (Tr. 10)

In response to this full statement by the Court, counsel agreed, "This is a trial de novo." (Tr. 11)

The unfairness resulting from the belated proffer of these materials is more than clear. Trial of the cause consumed some 11 days; some 37 witnesses appeared and testified; over 175 exhibits were submitted by the parties. During all of this time attorneys for the Justice Department were in possession of the Application to Merge, the transcript of the hearing before the Comptroller and the decision of the Comptroller and the various agency recommendations, and chose not to offer them in evidence. In their Post-Trial Brief they tried to accomplish by brief what they could not in the trial have attempted, they there used similar quotations from the Application to Merge wrenched out of context to buttress a case which otherwise on the record before the Court had clearly not been made. In our Post-Trial Brief we directed attention specifi-

cally to their presumptuousness in including these materials. (Defendant Banks' Post-Trial Brief, 23)

Last October plaintiff was given opportunity to supplement the record before Judge Shaw. But once again the Application and the reports were not placed in evidence.

The unfairness to the respondents is patent here. Even assuming that the materials could have been offered (which, of course, they could not), still defendants have been deprived of the opportunity of cross-examining the individuals who propounded the agencies' opinions as to the basis of their conclusions and, for that matter, their familiarity with the geographical area in question. Here we have the rankest of hearsay. The opinions stated were no doubt originally formed by unnamed, annonymous individuals, never cross-examined as to their purported expertise in the area. The facts on which the opinions are based are unknown; or worse, differ substantially in premise from the known facts which were presented on the record. The opinions were formed as to this specific case and with the knowledge that suit thereon might eventually be brought. Indeed, the opinions were formed as to the *ultimate* issue in the case. In summary, the agency reports constitute glorified hearsay, going to the ultimate issue in the case, and prepared with the suit in contemplation.

As to the recommendation of the Attorney General submitted to the Comptroller's office, there is an additional inequity in allowing reference to that document. Here, the recommendations and conclusions drawn constitute a self-serving declaration; the Justice Department is citing itself as expert and seeking to have

the court consider matters a trial de novo could never contemplate. Clearly, suit would not have been brought had Justice not reached an adverse decision as to competitive effect, but the materials upon which Justice reached that opinion have presumably already been put on the record during their affirmative case.

Another hidden inequity results from reference to agency reports which were filed with the Comptroller in 1967, some two years before the passage of the new banking law in New Jersey. That law has had considerable impact on the contours of the geographical market. Previously, a bank could only branch or merge with another bank in the same county. Now the State has been divided into three districts. Merging or branching can occur anywhere throughout the first district. Warren County is placed in the first district which also includes Hudson, Essex, Passaic, Morris, Sussex and Bergen Counties. (See 25a-27a) Combined these counties have an area of 2,015 square miles and a total population of 3,095,247 (*1969 New Jersey Legislative Manual*) Clearly, the agencies did not have opportunity to evaluate the impact of this change on the market and their conclusions could well have been vastly different if the expanded market potential of the first district had been considered.

II

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellee, Comptroller of the Currency and the PNB and SNB move that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are not new or novel and are so insubstantial as not to warrant further

argument. The issues as presented in the Jurisdictional Statement are self-created and do not at all reflect the evidence on the record or the treatment given that evidence in the opinion of Judge Shaw. Indeed, the issues as premised involve both a distortion of the evidence presented and a tortuous interpretation of the manner in which Judge Shaw treated the facts before him.

The position contended for by Justice does not take into account the competitive factors introduced in New Jersey by the 1969 Amendments to the banking and savings and loans laws.[4] These new amendments make Warren County where the defendant banks are located part of a seven-county district. Throughout this district branching and merger of commercial banks, savings banks and building and loans is permitted. N.J. S.A. 17:9A-19; 17:12B-26. This Court in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362, pointed out that in choosing a relevant market there must not only be an appraisal of the immediate impact of the merger upon competition, "but a prediction of its impact upon competitive conditions in the future."

In a hearing on the disposition of the statutory stay, facts were introduced to show the new law had trig-

[4] When submitting its report to the Comptroller with regard to the proposed merger of the Washington Trust Company, Washington, New Jersey into the National Newark & Essex Bank, Newark, New Jersey, the Justice Department fully recognized the significant changes in the market which the new law had produced and stated in this case that the merger would not have any significant effect on existing and potential competition. The Justice Department then clearly stated that "[the] recent broadening of the geographic boundaries of permissible branch office operation by commercial banks in New Jersey has induced substantial market extension activity, both by *de novo* branching and by merger". (GI30, Letter dated September 24, 1969, p. 3)

gered an explosion from which the dust has not yet settled. In 1968, for example, there were 22 applications for branches in the seven counties making up the first district. In the first nine months of 1969 there occurred 119 branch applications in the same area, over five times as many. (GI30)

It is in these circumstances that the plaintiff asks this Court to rule on the instant case. We submit that the circumstances of banking in New Jersey are changing so rapidly that the Court should not undertake the impossible task of judging a merger case in an unknown competitive climate. So volatile has the banking climate become in New Jersey that any decision by this Court would only serve as precedent for the past. The change in New Jersey banking law and the evidence of activity of the large banks in the First District (GI30) in merging and acquiring branches in said District makes this a moot case, not meriting review.

The First Question Presented

The first question presented by Justice is:

> "Whether in an antitrust action challenging a proposed merger of banks located in a community in which the banking business [5] is predominantly

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[5] It should be noted that the BMA '66 does not contain the assumption evident in the question propounded by the Justice Department that the "banking business" is the relevant line of commerce. Comparison of paragraphs A & B of 12 U.S.C. § 1828(c) 5 clearly shows that in paragraph B Congress omitted the reference to the banking business and did not include any coordinate reference to "line of commerce".

> "(5) The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in further-

local the court may properly refuse to consider the merger's probable effect on competition in that community because, on the basis of evidence of general social and economic integration, it deems

ance of any combination or conspiracy to monopolize or to attempt to monopolize the *business of banking* in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

Such an omission indicates a legislative intention to view mergers challenged under Section 7 of the Clayton Act consistent with the commercial realities faced by the two banks.

The commercial realities of the marketplace, the reasons leading to the omission of the term "banking business" and to the omission of any reference to "line of commerce", are more than evident when reference is made to Paul S. Nadler's *Commercial Banking In The Economy* (Random House, 1968). In this study Paul Nadler, an Associate Professor of Finance at the Graduate School of Business Administration at New York University states:

> "Banks do not compete only with other banks. Except for the holding of demand deposits and the consequent ability to create money, each bank finds itself competing in every area of lending with the various financial intermediaries, with the money and capital markets, with the ability of corporations to finance themselves through internal generation of cash, and with government financing units. (at 176)
>
> • • •
>
> The entire financial community is engaged in a trend toward what might be called *scrambled finance*, each type of institution becoming more like its competitors, and each bank and financial intermediary competing more with other institutions in its own industry as well as with institutions in other phases of the financial structure." (at 177)

> the relevant geographic market to be a broad multi-community area."

Justice in its argument juxtaposes two ideas: (1) that "general, social and economic integration should not be dispositive [in defining a market] though in a given case it may be relevant" (Jurisdictional Statement, 17) and (2) that the appropriate geographic market is "where the effect of the merger will be direct and immediate," citing *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357. Justice somehow divines that there is a discrepancy between these two. However, it is only "general social and economic integration" which provides the factual basis for a determination as to where the impact is "direct and immediate". Indeed, Judge Shaw in reaching his decision in this case followed the approach in *Philadelphia;* he looked to "where the banks in the relevant geographic market are directly and effectively competitive". (10a) Judge Shaw fully embraced the conclusion of the Supreme Court in the *Philadelphia* case that "attention must be focused upon a *small market* both in terms of area and in products and services of the merged bank." (Emphasis added) (12a)

In *Philadelphia,* the Court after discussing the "direct and immediate" test (374 U.S. at 357) turned in fuller explication of that test to *Tampa Electric Co.* v. *Nashville Coal Company,* 365 U.S. 320, 327, 5 L. ed 2d 586, 81 S. Ct. 623 and quoted the following with emphasis by the Court:

> ". . . the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can prac-*

tically turn for supplies." (374 U.S. at 359) (Emphasis by Court)

The Justice Department in its proposed question somehow seeks to forget the emphasis of the Court, to forget the voluminous evidence in the record as to where customers of PNB and SNB can turn to do their banking business; and to ignore the related evidence as to the mobility of the population, shopping patterns, commuting patterns and travel time statistics, all of which have been fully laid out on the record. (Tr. 174-175, 718-719, 816-817, 844-45, 979-80, 998-99, 1084, 1102-04, 1107-8, 1127-28, 1172, 1196, 1205, 1214, 1297-99, 1363, 1385, 1428-29, 1484, 1513, Ex. D-32, D-61, Ex. G-53 at 241.)

Definition of the market in this case clearly involves changing parameters of concern. When the Justice Department sought its stay of the merger pending the disposition of this appeal and sought to place various supplemental information on the record, there was also placed on the record evidence of the impact of the change in the New Jersey banking laws on competition in the area. Now, as noted before, the two banks are in a banking district including some 82 banks with total deposits of 7.3 billion. (GI30, Report by the Board of Governors of the Federal Reserve System, p. 2) The resulting bank will have 0.61% of total deposits in this district. (GI30, Commercial Banks In The First Banking District Of New Jersey Listed By Deposit Size as of June 30, 1969, at p. 2) The new district runs from the Hudson River to the Delaware River and includes some of the most populous counties in the State.

The seven-county area comprising the first district, on any basis looking to customer alternatives, clearly

approximates more closely the area of effective competition than does any limited area such as Phillipsburg-Easton and environs proposed by Justice before this District Court. In determining that the market included the four-county area in *Philadelphia,* this Court noted that it

> ". . . would seem to roughly delineate the area in which bank customers that are neither very large or very small find it practical to do their business." 374 U.S. at 361

The practicalities of the situation call to the forefront the facts of the case, and it is these which Justice now seeks to forget. In *Philadelphia* however the Court found that the facts supported a four-county market, one containing some 1420 square miles and 3.4 million people. Here Justice would like to remit the PNB and SNB to Phillipsburg[6] and environs or to Phillipsburg-Easton and environs, infinitesimally small areas with a meager population.[7] In contrast thereto the Court in *United States* v. *Third National Bank in Nashville*, 390 U.S. 171 considered a bank in Davidson County which has an area of 427 square miles and a 1960 census population of 399,743. (GI1)

The change in the contours of the banking market in New Jersey is already evidenced by the incursions of large Newark banks into Warren County. The National Newark & Essex with deposits of over 579

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[6] The population of Phillipsburg was erroneously stated in the Jurisdictional Statement to be 30,000. (p. 4) The correct figure, as taken from the 1960 census by Judge Shaw, is 18,502.

[7] Phillipsburg and environs as defined by the Justice Department contained a population of 28,500 in 1960. The population of Easton and environs in 1960 was 60,000. (Ex. D-15)

million has taken over the Washington Trust Company with offices in Washington, Oxford and White Township. (GI30). The First National State Bank is using a holding company to take over the Warren County National Bank with offices in Washington and Hackettstown. (GI30)

PNB and SNB entered their merger agreement in April 1967. Expanded branch banking was in the offing. They are merging clearly with the hope that a stronger bank will be able to resist the incursion of large first district banks into Warren County. In so doing they come clearly within the contemplation of the Court in *Philadelphia* when, in distinguishing the situation of Philadelphia National and Girard from ours it said:

> "This is not a case, plainly, where two small banks in a market propose to merge in order to be able to compete more successfully with the leading firms in that market." (374 U.S. at 370-371)

But those are the facts here. And it is those facts which the Justice Department wishes to forget.

The vagueness evident in the first issue proposed presents considerable difficulty in dealing with its substantiality. If Justice means that general social and economic factors are not to be considered in defining a market, then it seems that its proposed analysis flies directly in the face of cases like *United States* v. *Von's Grocery Company*, 384 U.S. 270 (1966) and *Brown Shoe Company* v. *United States*, 370 U.S. 294 (1962) Justice would then be turning its back on the application of the "usual antitrust analysis" of the market which it sought and which was held to apply in *Nashville*. In any case, the proposed issue, if its

purport can at all be grasped, appears to be insubstantial on its face.

The issue as proposed by Justice is really only a thinly veiled attempt to question the factual findings of Judge Shaw, an attempt to have this Court make an extensive review of the record to see whether his factual findings are clearly erroneous. Clearly this case is not one which merits review.

The Second Question Presented

The second question proposed by Justice is equally devoid of merit. It, in effect, asks whether the convenience and needs accruing to the benefit of the public in a portion of the geographical market, the "community", can ever, on the facts, be sufficient to outweigh any conceivable anticompetitive effect in the "section of the county" found to be an economically significant market. The question reads:

> "Whether, in such an action, the court's consideration of the 'convenience and needs of the community to be served' is *legally insufficient* if the 'community' whose 'needs' are considered is *narrower* than the relevant geographic market in which the anticompetitive effects of the merger are measured." (Emphasis added)

It should be noted at the outset that there was a complete failure of proof as to anticompetitive effect; that the appellant, as was incumbent on him, did not show the merger to be anticompetitive. Unless the appellant prevails on its first proposed question, there is no need to consider the others at all. They are merely matters of defense. Thus, the Justice Department is forced to rely fully on its first question to sustain its burden of showing that the questions raised

are substantial. Since the lower court did not find any anticompetitive effect, matters of defense cannot be considered unless the appellant prevails on its first question looking to the use made by Judge Shaw of general social and economic factors in delineating a market. As noted before, both the case law and the facts on the record wholly support the market determined by the lower court.

The court below indicated there was no trend toward concentration, no existence of any undue concentration and thus there "can be no *presumptive* inference of anti-competitive effect. (27a) (emphasis by the Court) It further pointed out that the evidence did not support Justice's theory that mergers tended to increase interest on loans and to decrease interest paid on deposits. (27a) The Court concluded that there was a "preponderance of evidence to support a conclusion that the merger would have a procompetitive effect" if the merged bank adopted aggressive policies. (28a) The Court concluded that plaintiff "failed to sustain its burden of proof to establish by a preponderance of the evidence that the merger would have any measurable anticompetitive effect". (28a)

Appellant having failed to establish its case, it was not incumbent on the defendants or the Court to decide the convenience and needs defense, which herein is put forth as an "even if" argument. This Court, it is submitted, must conclude that Justice by a fair preponderance of the evidence proved the merger to be anticompetitive before it gives any consideration to the second question presented.

In the second question the Justice Department seeks to convert a question of fact (whether the convenience

and needs of the community clearly outweigh the anti-competitive effect) into a question of legal sufficiency. Justice would have us look to two concentric circles; one to be labelled Phillipsburg, the other to be called the geographical market arrived at in the opinion of Judge Shaw.

But just as a pure question of logic, "of legal sufficiency", advantages in the core of the market can exceed anticompetitive effect in the whole of the market. Assuming for purposes of this motion that Judge Shaw only looked to Phillipsburg, then once he had determined that the convenience and needs in certain portions of the community exceeded the anticompetitive effect, there was no need to go further. He could determine that the scale clearly favored the convenience and needs of the community; he need not determine that it overwhelmingly favored such needs. Thus, simply as a question of the preponderance of the evidence which this Court should not be called upon to determine, the question posed is one which does not merit review. The question posed answers itself. The judge need not go any further once he determines that the clear weight of the evidence favors the convenience and needs of the community.

Appellant argues that this Court has not heretofore defined the difference between "section of the country" and "community", and that therefore the appeal should be allowed so the Court can clarify the meaning of these terms. The insubstantiality of this proposal is clearly demonstrated by the fact that this Court has already fully considered the difference between "community" and "section of the country" in another section 7 case and fully disposed of the matter. The issue thus is neither new nor novel.

Reference to the legislative history of Section 7 of the Clayton Act is necessary here. When originally enacted in 1914 it referred in pertinent part to restraint of commerce "in any section or community". The 1950 amendment resulted in deletion of the reference to "community" and adoption of the present language as now incorporated in B.M.A. '66. In *Brown Shoe Company* v. *United States,* 370 U.S. 294 (1962) this Court in an opinion by Chief Justice Warren fully considered the import of the change in terminology:

> "The deletion of the word 'community' in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in *an economically significant* 'section' of the country." (Id. at p. 320) (Emphasis added)

By footnote the Court fully expounded the legislative history of the Act and the reasons for reaching this result. The distinctions made at the time, of course, fully expose the error of the Justice Department in now seeking to make Phillipsburg or Phillipsburg-Easton and environs the "community" within which to judge anticompetitive effect:

> "The Federal Trade Commission's amendment, see note 30, supra, included the phrase 'where . . . in any section, community, or trade area, there is reasonable probability that the effect of such acquisition may be to substantially lessen competition." Congressman Kefauver urged deletion of the word 'community' on the ground that it might suggest, for example, that a merger between two small filling stations in a section of a city was proscribed. Hearings on HR 515, at 260. And see also 96

> Cong Rec 16453. The fear of literal prohibition of all but de minimis mergers through the use of the word 'community' was also cited by the Senate Report as the basis for its retention solely of the word 'section.' S Rep No. 1775, 81st Cong, 2d Sess 4. The reference to 'trade area' was deleted as redundant, when it became clear that the 'section' of the country to which the Act was to apply, referred not to a definite geographic area of the country, but rather the geographic area of effective competition in the relevant line of commerce. See S Hearings on HR 2734, at 38-52, 66-84, 101-102, 132, 133, 144, 145; HR Rep. No. 1191, 81st Cong, 1st Sess 8; S Rep. No. 1775, 81st Cong, 2d Sess 4, 5-6. The Senate Report cited with approval the definition of the market employed by the Court in Standard Oil Co. v. United States, 337 U.S. 293, 299 note 5, 93, L ed 1371, 1378, 69 S Ct. 1051." (370 U.S. at 320 n. 35)

Expanding on this distinction, the Court continued:

> "The 1950 amendments made plain Congress' intent that the validity of [mergers] was to be gauged on a broader scale; their effect on competition generally in an *economically significant market.*" (p. 335)

It was the clear intent that:

> "The geographic market selected must, therefore, both 'correspond to the commercial realities' *and* be economically significant." (Id. at pp. 336-7) (Emphasis added)

When Mr. Justice Brennan turned to the banking situation in *Philadelphia* he confirmed the applicability of this reasoning in *Brown Shoe.* He noted defendant's concession that "the four county area has *sufficient commercial importance* to qualify, under Brown

Shoe Co. supra. (370 U.S. at 336, 337),[8] as a "section of the country" within the meaning of § 7". (374 U.S. 321, 359 *n.* 36 (1963) (Emphasis added)

In the light of the legislative history and the intervening opinions of this Court in *Brown Shoe* and *Philadelphia,* there is no question that Congress fully understood the difference between "community" and "section of the country" when it passed B.M.A. '66. There is absolutely no need to review this distinction again. Sound, established rules of statutory construction apply the same meaning to statutes *in pari materia.* There is no need for this Court to reaffirm again the applicability of this rule.

The difference in terminology between "community" and "section of the country" also supports the conclusion that Justice's first issue, looking to whether general economic and social factors can be used to define a market, also lacks substance and should not be considered by this Court. "Section of the country" as noted in the *Brown Shoe* and *Philadelphia* opinions refers to an "economically significant" area, one that has "sufficient commercial importance." But as the exhibits in this case show the enumerated towns in Phillipsburg-Easton and environs as proposed by the Justice Department for its "economically significant" market only have a population of 88,500, or five ten-thousandths of the total population of this country. (Exh. D-15; 1970 World Almanac, 252) Justice proposes to fragment the country into literally thousands of tiny markets and to view anticompetitive effect in each. But are they economically significant, are they

[8] These are the same portions of the *Brown Shoe* opinion quoted above.

of sufficient commercial importance? The purported issue is frivolous, especially in light of the clear legislative history and the prior Supreme Court decisions completely disposing of the issue.

The Third Question Presented

In the final question presented the Justice Department asks this Court to determine whether the lower court adequately evaluated the convenience and needs test in looking to whether there was a less anticompetitive means to achieve the same benefits. The question reads:

> "Whether, in any event, the court below erred in its determination of the convenience and needs issue by failing adequately to consider whether the same benefits could be achieved by less anticompetitive means." (Jurisdictional Statement, 4)

This question also is devoid of merit; the issue as stated does not present any new question to be resolved by the Court.

In *United States* v. *Third National Bank in Nashville*, 390 U.S. 171, (1968) a case in which the lower court had failed to apply the appropriate Section 7 Clayton Act formula this Court fully laid out the applicable alternative means test. There the Court said that it was:

> ". . . incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma . . . short of merger with a major competitor *but failed in these attempts, or that any such efforts would have been unlikely to succeed.*" (390 U.S. at 189) (Emphasis added)

This clear statement of the issue was followed by Judge Shaw in his opinion:

> "The government stresses the argument that neither PNB nor SNB have made any genuine effort to recruit specialists to head a commercial and industrial loan department or a trust department, but the evidence does establish that such specialists are not easy to find and not likely to be induced to accept employment for a small salary or with a very small bank. It is, however, *clear from the evidence* that neither bank can afford the expense of employing well trained specialists to head a loan and trust department. There was tentative exploration of the possibility of obtaining qualified bank officers which ceased when it became *clear that the expense was out of reach.* (30a-31a) (Emphasis added)

Justice would now have this court re-examine the evidence to see if it indeed was clear. (Tr. 551-559, 581-3, 880-1, 1164-6, 1228, 1375-76, Ex. G-84, pp. 289-90; Ex. G-53, pp. 234-5) A review on the facts is, once again, all that is sought here. As the transcript references indicate, there was more than ample evidence to support Judge Shaw's conclusions.

Let us look to some of the proposed alternatives suggested by the Justice Department. One proposed alternative is that of "a merger by one of the defendants with a bank in another city in the newly-created first banking district". (Jurisdictional Statement, 22 *n.* 19) Leaving for now the question of the straits within which this leaves the other of the defendant banks, let us look to the reasonableness of this basic proposal. The defendant banks agreed to merge in April 1967, some two years before the effective date of the new banking statute. Can we say *at that time* that such an alternative was *available?* Clearly it was

not. Is Justice to have the delay it has imposed on these two small banks over the last three years counted to its benefit when it takes its final appeal to the Supreme Court and now suggests alternatives never available at the relevant time? The very fact that Justice has made this proposal shows the utter insubstantiality of its proposed appeal. Its only function is to impose greater costs on these two banks in the hope that any merger for any small bank will become a truly uneconomic, unavailable alternative.

Other proposals made by Justice are mere palliatives, with no hope of curing the deep underlying problems facing these two banks. They propose the use of stock dividends instead of cash dividends and internal development to provide opportunity for growth. (Jurisdictional Statement, 21, 22) Officers of two banks, one in Phillipsburg and another in Hunterdon County, testified favorably for the merger. On questioning they indicated they had given stock dividends as well as cash dividends. Appellant now uses this testimony to suggest an alternative PNB and SNB should have used to raise their lending limit. However, this collocation of the facts put forth by Justice depending as it does on incidental statements in the record only shows the limitations of their argument. None of the alternatives would solve the total problem of these two banks.

The Justice Department suggests that PNB and SNB should have sought out each of the banks in the area and proposed merger. The ultraconservative policies of these banks, as referred to by Judge Shaw (p. 28a) show this would most likely have been futile. Now, of course, these banks are unavailable because of the enhanced opportunity to obtain a premium for

their stock from larger banks in the first district. Now, a Newark bank and the largest bank headquartered in Bergen County have already separately absorbed the two previously independent banks in Hackettstown (GI30). There is in this merger no premium to one bank as contrasted with the other. William F. Greenley, Jr., senior vice president of Fidelity Union Trust Company answered the question as to whether there were any premiums in the merger transaction (Tr. 555-6):

> "I think surprisingly in these things—you usually get into awful hassles as to—because some interested party wants to make a couple extra bucks, which you can't blame him for—but there was nothing like it in this picture. As a matter of fact, I think just on the statistical basis the actual settlement came down pretty close to what you would have done just doing it on a pen and pencil basis."

Furman Denton, executive vice president and cashier of the First National State Bank of New Jersey, stated he had a chance to examine the application to merge, that he thought the terms "were eminently equitable, that there did not appear to be any premium. And the sole objective appeared to be to put together two banks on a proportionately equal basis". (Tr. 1114-15)

By footnote Justice seeks the right to urge that the court erred in rejecting commercial banking as a relevant line of commerce.[9] (Jurisdictional Statement, 3 *n.* 1) By separate footnote, however, they admit that the error "did not affect the result in the case" and therefore they "do not urge it as a question independently warranting plenary review". The question

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[9] See Paul S. Nadler, *Commercial Banking in the Economy* (Random House 1968) pp. 173-78.

is not dispositive in this case and by Justice's own admission should not lead this Court to note probable jurisdiction unless some separate ground raised appears substantial.[10] However, defendants question the practice of Justice in putting defendant banks to the expense of briefing and arguing a question which all admit is not dispositive.

III

MOTION TO ADVANCE THE CAUSE FOR EARLY ARGUMENT

Pursuant to the rules of this Court defendant banks and the Comptroller of the Currency move the Court that it schedule the cause for early argument. The Court need only pass on this motion if it decides not to affirm the Court below. Persuasive reasons exist to justify this request.

The agreement to merge was entered into in April of 1967. Application to approve the merger was made to the Comptroller on May 1, 1967. A hearing was had before the Comptroller on August 14, 1967. The Comptroller approved the merger in November of 1967. The United States filed suit in the District Court on January 16, 1968. An eleven-day trial was had in September 1968. The District Court judge filed his opinion and judgment was entered on October 20, 1969. The notice of appeal was filed on November 28, 1969 and the jurisdictional statement was filed January, 1970. Unless the matter is expedited the decision may be delayed in this Court until 1971—four years or almost four years after the initiation of merger efforts.

It takes no imagination to realize from a mere recital of the proceedings thus far how much time of

[10] Defendants claim that this question cannot be considered unless the court finds that the first question posed is substantial.

officers and bank personnel has been expanded, how much expense involved and how much delay in hiring needed executives has occurred while awaiting the outcome of this suit. There is even more urgency that a final determination be had by reason of the 1969 banking and savings and loan legislation setting up a seven-county banking district, supra pp. 11-14, 17. It is imperative with mergers and branching on the increase in the first district (GI30) that both banks be able to plan to meet the changing competitive factors.

As we have shown previously, other banks in the first district are already expanding into Warren County.[11] Maintaining the status quo pending final determination in this Court is most difficult for the banks and deprives the area of services from which they could well profit.[12] An early decision would put an

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[11] Justice takes exception to Judge Shaw's opinion when he states that there are "many locations (in the New Jersey part of the geographic market) where either a bank or a branch bank could be established". (App. A, *infra*, p. 27a) (Jurisdictional Statement, 14) Justice seems to have the impression that "home office protection" relates to all communities under 7500. However, the law only prevents entry by branching. Justice has apparently forgotten that a bank can enter by establishing a new main office, whether or not there is another main office or branch in the community.

[12] As Paul S. Nadler in *Commercial Banking In The Economy* states:

> "The banks recognize that if they wish to prosper, their role in the economy must be no longer merely commercial banks—the outgrowth of goldsmiths—but rather suppliers of full financial services—meeting needs of customers never dreamed of when banking was developed, and prepared to meet future customer needs that have not yet even been formulated."

It is these new services which the Bank Merger Act of 1966 in part referred to in requiring consideration of the convenience and needs of the community.

end to the harassment of two small banks by the superior resources of the Anti-trust Division. The dispute should be resolved early and soon so that there can be sound planning for the future.

It is respectfully requested that the motion to strike be granted and the judgment of the District Court be affirmed. In the alternative it is requested this case be scheduled for early argument.

Respectfully submitted,

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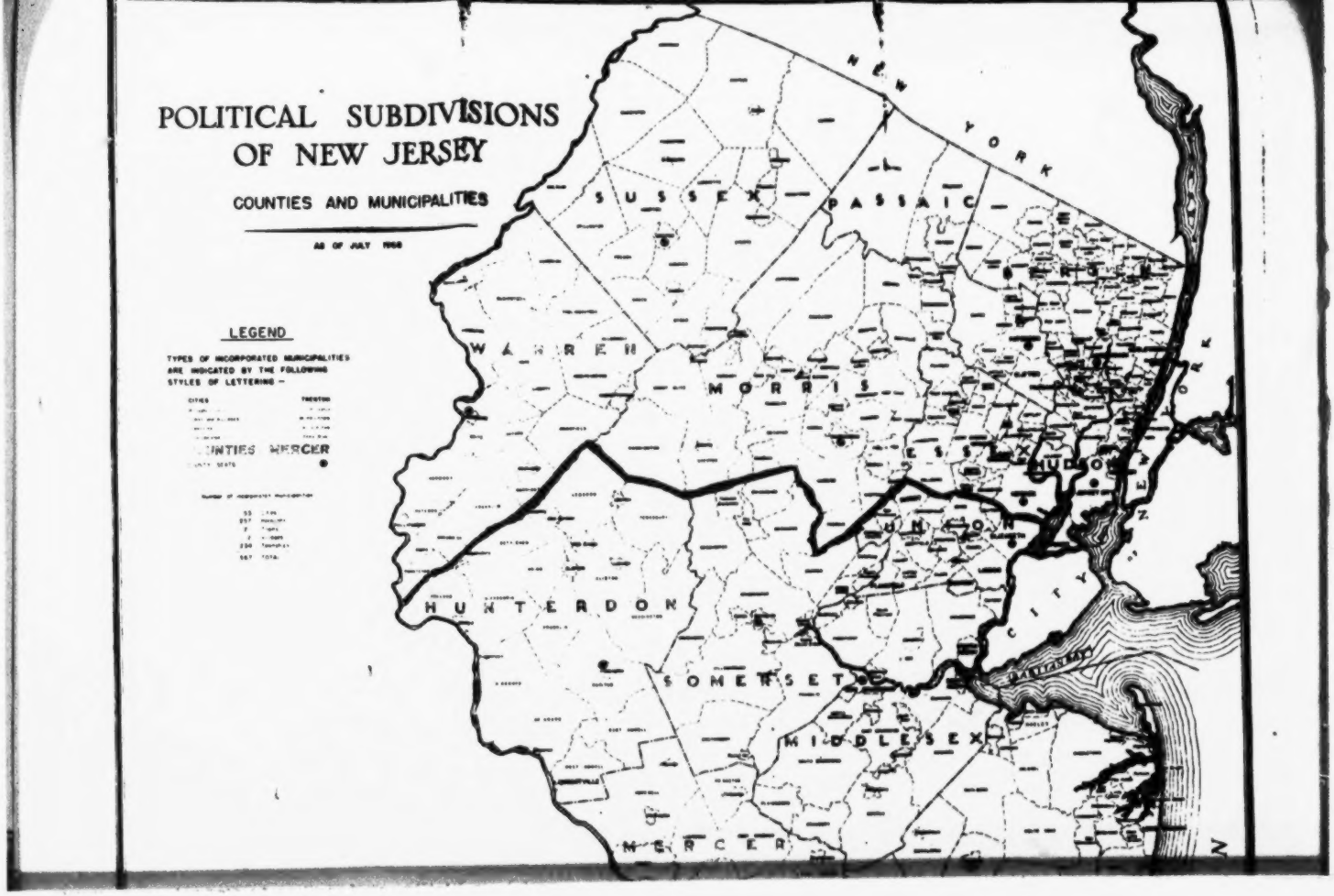
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